



LITIGATION SECTION
THE STATE BAR OF CALIFORNIA

May 6, 2003

Hon. James D. Ward
Vice Chair, Judicial Council Task Force on Jury Instructions
California Court of Appeal, Fourth Appellate District
3389 Twelfth Street
Riverside, CA 92501

**Re: California State Bar Litigation Section Comments on
Judicial Council Task Force on Jury Instructions,
Civil Jury Instructions, Fourth Set**

Dear Justice Ward:

On behalf of the Litigation Section of the State Bar, we submit the attached Report that contains comments on the Fourth Set of Civil Jury Instructions prepared by the California Judicial Council's Task Force on Jury Instructions.

We again have attempted to provide the views of experienced litigators who bring different perspectives from different practice areas, backgrounds, and points of view. We have attempted to achieve a balance between the perspective of plaintiffs and that of defendants. We again organized ourselves into subgroups based upon individual interests and expertise, and then discussed the proposed comments as a committee. Following extensive telephone and e-mail exchanges within the sub-groups, the committee as a whole met each Tuesday and Thursday evening starting in late March and continuing through late April. Further discussion occurred at a recent meeting of the Executive Committee of the Litigation Section, which has approved the comments for submission to the Task Force.

Once again, the members of the Committee on Jury Instructions enthusiastically endorse and encourage the work of the Task Force. We believe that the Task Force's proposed jury instructions are a significant improvement over earlier sets of standard jury instructions, including the BAJI jury instructions that are commonly used in California today.

Although the attached Report addresses most sections of the Fourth Set, it does not address all sections. We were simply unable to address all sections during the comment period.

The comments are not as extensive as the length of the Report might make them appear. The length of the Report results primarily from our decision to repeat the full jury instruction and the related sources and use notes to provide context for our comments.

The comments typically are suggestions that the Task Force consider or reconsider particular portions of the jury instructions. The comments do not necessarily reflect the fixed views of any individual member of the Committee on Jury Instructions or of any individual member of the Litigation Section Executive Committee.

Two areas merit special mention.

First, the Committee believes that the “Contracts – Lost Profits” jury instructions (851-852) should be modified so that jurors are not misled into believing that the same “reasonable certainty” standard applies to: (1) the fact that such profits were lost; and (2) the amount that was lost. We believe that the reported decisions make a clear distinction between these two elements of proof and allow the amount of damages to be shown by some “reasonable basis.” (The Committee made a similar suggestion regarding the Torts – Lost Profits jury instruction (2004N) that was included in the Third Set.) In our view, the use of “reasonable certainty” with respect to the amount of profits lost would create an inappropriately high hurdle for a plaintiff in such cases.

Second, the Committee believes that there should be an additional jury instruction with respect to assumption of risk in connection with sports activities. The Task Force’s Third Set included an instruction (316A) that addressed the liability of a co-participant in a sport activity. The Committee believes that there is a different and more common situation where the injured sports participant makes a claim against the owner or operator of the sports facility. The proposed instruction which we have labeled 316C addresses this different situation.

On behalf of the Committee on Jury Instructions, we again applaud the difficult, but exciting work of the entire Task Force and its staff attorneys, which is now nearly concluded by the release of the Fourth Set. The Task Force’s six years of work, in our view, provides a substantial service not only to the bar, the bench, and future California jurors, but also to the general public, which often is affected in many indirect, but substantial ways, by verdicts rendered by California juries. The clarity and accuracy of jury instructions are key components in our judicial system’s ability to resolve disputes fairly.

The Litigation Section endorses the Judicial Council’s expected approval of the Task Force’s jury instructions. We await the adoption and use of these new jury instructions by California trial courts, which we anticipate will occur as early as this fall.

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I would like to thank you, Justice Ward, as well as Starr Babcock, Jerry Sapiro and Lyn Hinegardner for providing the impetus for our Committee's work and for providing help and encouragement throughout the comment process. Chief Justice George, of course, also deserves credit for identifying such a significant issue and for establishing such a talented Task Force to undertake such a daunting project.

Very truly yours,

A handwritten signature in black ink, reading "Richard L. Seabolt". The signature is written in a cursive, flowing style.

Richard L. Seabolt

RLS:bc

cc: Laura Lee Blake, Litigation Section Chair
Executive Committee of the Litigation Section
Committee on Jury Instructions (list attached)

Starr Babcock, Special Assistant to the Executive Director
State Bar of California

Jerome A. Sapiro, 2000-2001 Litigation Section Chair

Lyn Hinegardner, Esq.
Administrative Office of the Courts
Office of the General Counsel